INDEX

PAGE

PETITION 1

Statement of Matters Involved 2

Questions Presented 7

Reasons for Allowance of Writ 8

BRIEF IN SUPPORT OF PETITION 11

Opinions Below 11

Jurisdiction 11

Statement of the Case 12

Specification of Assigned Errors to be Urged 12

ARGUMENT

1. The fact that petitioner assisted others in obtaining sugar for use in the illicit distillation of alcohol, coupled with the further fact that he knew of their purpose, did not render him guilty of conspiracy 12

2. The holding that the Government properly introduced evidence (other than certified proof of conviction) that petitioner was guilty of an unrelated felony, for the purpose of collateral impeachment, was contrary to established federal law 13

3. The Trial Court improperly proceeded in the presence of the jury to punish a Government witness for contempt for refusal to testify, and to permit the jury to draw an inference unfavorable to petitioner from the attendant circumstances 14

PAGE

4. The reception in evidence of telephone company toll slips and the prepared chart summarizing the calls made to and from public telephones located in petitioner's two restaurants tended to suggest his complicity in the conspiracy and was prejudicial error 15

5. Prejudicial declarations of alleged co-conspirators made after the termination of a conspiracy are inadmissible 16

6. Reasonable doubt may not be explained to a jury by inconsequential illustrations drawn from everyday affairs 16

7. The holding that the jury be required to continue its deliberations indefinitely after it had announced its inability to agree was improper 17

8. The cumulative effect of all of the foregoing errors and rulings was such as to deprive petitioner of a fair trial 18

Conclusion 18

TABLE OF CASES

	PAGE
Benton v. State (Ga. App.) 199 S. E. 561	14
Beyer v. United States (C. C. A. 3) 282 F. 225	14
Coulston v. United States (C. C. A. 10) 51 F. 178	14
Fabacher v. United States (C. C. A. 5) 20 F. 2d 736	14
Hopt v. Utah, 120 U. S. 430	16
Lile v. State (Ark.) 54 S. W. 2d 293	14
McNutt v. United States (C. C. A. 8) 267 F. 670	14
Niederluecke v. United States (C. C. A. 8) 21 F. 2d 511	14
Oras v. United States (C. C. A. 9) 67 F. 2d 463	16
Paddock v. United States (C. C. A. 9) 79 F. 2d 872	16
Parlton v. United States (Ct. of Ap. D. C.) 75 F. 2d 722	18
People v. Rubin, 286 N. Y. 56	15
People v. Van Arsdale, 242 App. Div. 545, 266 N. Y. S. 502	14
Pinn v. Commonwealth (Va.) 186 S. E. 169	14
Robilio v. United States (C. C. A. 6) 291 F. 975	15
Rowan v. State (Md.) 3 Atl. 2d 753	15
Rutherford v. United States (C. C. A. 2) 258 F. 855	14
Seeman v. United States (C. C. A. 5) 90 F. 2d 88	16
State v. Smith, 179 La. 294, 154 So. 2	14
Terry v. United States (C. C. A. 9) 7 F. 2d 28	14
United States v. Falcone, 311 U. S. 205	12
United States v. Frankel (C. C. A. 2) 65 F. 2d 285	15
United States v. Lonardo (C .C. A. 2) 67 F. 2d 883	16
United States v. Sager (C. C. A. 2) 49 F. 2d 725	14
Wissel v. United States (C. C. A. 2) 22 F. 2d 468	17

STATUTE

Judicial Code as amended, 28 U. S. C., Sec. 347:
Section 240(a) 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Jacob Novick respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on December 17, 1941, affirming a judgment of the United States District Court for the Southern District of New York, entered on May 28, 1941, convicting the petitioner of conspiracy (18 U. S. Code, Sec. 88) to defraud the United States of taxes on distilled spirits.

Statement of Matters Involved

The indictment named seventy-three defendants (R. 24-25). It proceeded to trial and verdict with respect to sixteen of them. The jury began deliberating on May 26, 1941, at 2 P. M. (R. 495). Some four hours later they returned a verdict as to fourteen defendants, finding ten guilty and four not guilty (R. 497-498). Another half hour elapsed and the jury found the fifteenth defendant guilty (R. 503). By now it was 7 P. M. and the jury went out to dinner, after which they continued their deliberations (R. 504). At 9:15 P. M. the jury reported to the Court in writing (R. 504):

> "The jury is sorry to report that it is split on Jacob Novick after long and careful discussion."

The Court directed the jury to continue considering the case as to petitioner. At 11 P. M. they were taken to a hotel for the night (R. 504-505). The next morning they resumed and deliberated into the afternoon, when at 2:35 they returned a verdict of guilty against petitioner (R. 505-510). In the course of their deliberations they had come back several times for additional instructions.

Petitioner was sentenced to twenty months' imprisonment and a fine of $5,000 (R. 511). Pending the appeal to the Circuit Court of Appeals he was admitted to bail by that Court (R. 2). The conviction was affirmed, with an opinion by Clark, Circ. J. Thereafter the Circuit Court of Appeals continued bail pending the filing of the present petition for certiorari, the United States Attorney not opposing.

A certain syndicate, including scores of individuals, was engaged in the illegal manufacture, distribution and sale of alcohol. Their activities are generally described in a four-page stipulation (R. 63-66).

Petitioner is a man of forty, and had never previously been convicted of any crime (R. 363). He was in the real

estate business and owned two restaurants in Yonkers, the Kennedy House and the Prospect Grill (R. 363-364). At the time of the alleged crime he was operating both of these simultaneously. They were four or five blocks apart (R. 365). Each establishment had a telephone booth containing a coin box telephone, available to and used by the public, but neither had any private telephone (R. 365-366). The nature of petitioner's business was such as to cause him to become widely acquainted in Yonkers. He knew many persons, some of whom were not law-abiding. He had legitimate dealings with several of the defendants, and he may have unwittingly assisted others in their illicit operations. The gravamen of the charge against petitioner is that he assisted other of the defendants, it is alleged, in obtaining sugar used in the illegal manufacture of alcohol.

I.

This brings us to a consideration of the theory of prosecution. It is perhaps best summarized by the following assertion with regard to petitioner, contained in the United States Attorney's brief in the Circuit Court of Appeals (p. 6):

> "The evidence offered by the Government touching upon the arrangements for sugar, unmistakably pointed to the appellant as the procurer of this most essential commodity in the production of alcohol. The proof shows that over $22,000 worth of sugar was utilized by these defendants."

Such participation, even if proved, does not render petitioner a party to or guilty of conspiracy.

II.

Petitioner took the witness-stand. On cross-examination he denied that he was a policy banker or in the "numbers racket" (R. 407-408). In rebuttal the prosecution called a police detective, who was permitted to testify over

objection and exception that in his opinion certain papers found on the person of petitioner showed that he was a policy banker (R. 459-460). The Government thus improperly attempted to impeach petitioner on a collateral issue.

III.

One Harrison was called as a witness by the Government (R. 191). He refused to testify (R. 191-193). The prosecutor declared that he had a statement from the witness. Whereupon in the presence of the jury the Trial Court ruled (R. 192):

> "Let the record show that Louis Harrison was called as a witness on behalf of the Government and he declines to be sworn and says he will not testify as to the matters concerning which the District Attorney interrogated him and upon which he gave a statement to the District Attorney on the 12th day of June, 1940, and he also refuses to testify as to a statement made on June 14th, 1940, and another on the 15th day of June, 1940.
>
> "In view of this refusal to be sworn and to testify by the witness Harrison, I have no other alternative but to adjudge him in contempt of court, and I commit him to the House of Detention until such time as he testifies and purges himself of this contempt."

Defense counsel attempted to prevent the jury's drawing any unfavorable inference from the foregoing proceedings, with indifferent success and a motion for a mistrial was denied (R. 192-194).

IV.

The stipulation referred to above contains the following provisions on the subject of telephone calls (R. 66):

> "IT IS STIPULATED that Government's Exhibit 173 constitutes a chart prepared by Government agents showing telephone calls made to and from the various defendants during the life of the conspiracy, and it is further

"STIPULATED that Government's Exhibit 173 insofar as it contained any records of phone calls made to or from the telephone numbers Yonkers 6631 and Yonkers 9762 was objected to by counsel for the defendant, Novick, upon the grounds that the record was not binding on the defendant and did not constitute proof of any calls made by the defendant or to the defendant, and it is further

"STIPULATED that toll slips covering each of the calls enumerated from the said two telephone numbers were offered in evidence and received in evidence over objection by counsel for the defendant, Novick, upon the same grounds as urged with respect to the offer of Government's Exhibit 173. It was conceded by defendant's counsel that the records as such were legitimate records of the New York Telephone Company with respect to the chart, the telephone contracts covering the said two numbers and the toll slips covering the calls made as represented on the chart."

An inspection of Government's Exhibit 173 (R. 516) reveals that it establishes the making of various telephone calls from the public pay stations in the Prospect Grill and the Kennedy House (both restaurants owned by petitioner) to Gallo, Matullo and Bellotti (all defendants), as well as calls to the restaurants. Exception was duly noted to the reception in evidence and the ruling was assigned as error (R. 532)—as was done in the case of the other rulings we have discussed above.

V.

A government witness, Anthony J. Sylvestri, testified that the still in Lawton Street was raided on December 23d, 1939. Over objection and exception he was then permitted to testify as to a conversation with one Milo, wherein the latter stated to the witness that petitioner "told him that something went wrong" (R. 328-331). This testimony as to a declaration of an alleged co-conspirator after the termination of the conspiracy was clearly susceptible of an incriminating construction against petitioner.

VI.

A few minutes before rendering the verdict against petitioner and after more than twenty-four hours had elapsed since the inception of their deliberations, the jury returned for the sixth time and presented the following note to the Court (R. 506):

> "The jury requests that, for further clarification, the Court explain again what constitutes reasonable doubt and the weight which should be given circumstantial evidence."

The trial Court proceeded to instruct them, inter alia, as follows (R. 507):

> "As I explained to you yesterday in the illustration that I gave you about buying goods for the fall trade, you do not know for certain what is going to happen about the war, but nevertheless you think perhaps there will be war, that prices are going up, so you buy rather heavily upon the assumption that buying now, that you will make a good profit upon the goods purchased. War may not come about at all, but you have banked your judgment and invested your money in it, and that is the conclusion you have reached by reason of the evidence that surrounds you. And so you have no reasonable doubt in that case.
>
> "Or you come out of the house in the morning and you look at the sky and it is sultry and cloudy in the west and you feel moisture in the air. Now, you are not certain it is going to rain, but nevertheless you have a reasonable doubt as to whether or not fair weather is going to continue. That is about all there is to it. When you make up your mind about anything, about your family, as to what it is going to do in the summer, or as to what provision should be made for a child, you can't be certain that what you have planned and arrangements you have made will be necessary, but nevertheless the evidence all about you indicates that what you do is the thing to do because you have no reasonable doubt about it."

The use of these trifling illustrations in the supplementary charge is assigned as error (R. 536-537).

VII.

After the jury reported in writing (R. 504):

> "The jury is sorry to report that it is split on Jacob Novick after long and careful discussion."

the trial Court nevertheless insisted that they continue deliberating. It declared, "Disagreements accomplish nothing." It reminded them of the "great deal of money" which the trial cost the government—although verdicts had already been rendered as to fifteen other defendants. The Court further indicated that the jury would be required to continue deliberating for an indefinite time, and directed that if they could not agree they should be taken to a hotel for the night (R. 504-505). Error is assigned for the failure to discharge the jury at this time (R. 535-536).

Questions Presented

I.

Did the fact that petitioner assisted others in obtaining sugar for use in the illicit distillation of alcohol render him guilty of conspiracy?

II.

Was it error for the trial Court to permit the Government to introduce evidence tending to impeach petitioner on a collateral issue and thus bring before the jury the suggestion that petitioner was guilty of another crime (a felony) unrelated to the indictment?

III.

May a trial court in the presence of the jury punish a Government witness for contempt for refusal to testify and permit the jury to draw an inference unfavorable to a defendant from the attendant circumstances?

IV.

Is it error to receive in evidence telephone company toll slips and a prepared chart summarizing calls made to and from public telephones located in two restaurants owned by a defendant and to suggest thereby his complicity in a conspiracy?

V.

Are prejudicial declarations of alleged co-conspirators, made after the termination of a conspiracy, properly receivable in evidence?

VI.

May a trial court define reasonable doubt by giving illustrations relating to the weather, business deals, vacation plans and similar relatively inconsequential matters?

VII.

When a jury reports a disagreement as to one of sixteen defendants after long and careful discussion, may the trial court require the continuation of deliberations under the circumstances presented?

VIII.

Was not the cumulative effect of all of the foregoing rulings such as to deprive petitioner of a fair trial?

Reasons for Allowance of Writ

1. The rulings below that the petitioner's alleged assistance to others in obtaining sugar for use in the illicit distillation of alcohol rendered him guilty of conspiracy, is in direct contravention of a recent holding of the Supreme Court of the United States.

2. The holding that the Government properly introduced evidence (other than certified proof of conviction) that petitioner was guilty of an unrelated felony, for the purpose of collateral impeachment, was contrary to established federal law.

3. The approval of the conduct of the trial Court in adjudging a Government witness in contempt for refusal to testify, in the presence of the jury, is at variance with previous holdings of Circuit Courts of Appeals.

4. The reception in evidence of telephone company toll slips and a prepared chart summarizing calls made to and from public telephones located in two restaurants owned by a defendant, for the purpose of suggesting thereby his complicity in a conspiracy, is clear and prejudicial error.

5. The decision that prejudicial declarations of alleged co-conspirators made after the termination of a conspiracy are admissible in evidence contravenes settled law.

6. The approval of the illustration of reasonable doubt by trivial examples is a holding at variance with the law as declared in another Circuit.

7. The holding that a jury may be required to continue its deliberations indefinitely after it has announced its inability to agree is improper.

8. The cumulative effect of all of the foregoing rulings was such as to deprive petitioner of a fair trial.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings

of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated New York, N. Y., January 6th, 1942.

JACOB NOVICK,
By JACOB W. FRIEDMAN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record filed herein. No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on December 17, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C., Sec. 347.

Statement of the Case

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged

The assigned errors to be urged are identical with the "Reasons for Allowance of Writ" set forth in the foregoing petition.

ARGUMENT

1. The fact that petitioner assisted others in obtaining sugar for use in the illicit distillation of alcohol, coupled with the further fact that he knew of their purpose, did not render him guilty of conspiracy.

Of course, the factual assumption herein is made only *arguendo*. In order that the foregoing situation should suffice to establish petitioner's guilt, the Government must also clearly prove that he had knowledge that the parties for whom he procured sugar were parties to a conspiracy. Even if he were the actual seller to codefendants of the sugar, he would not be guilty. It must be remembered that he is not charged with aiding or abetting any substantive offense.

In the recent case of *United States* v. *Falcone*, 311 U. S. 205, this Court held that jobbers and distributors who sold sugar, yeast and cans, with knowledge that the materials would be used in illicit distilling operations, but without knowledge that the buyers were parties to a conspiracy, were not guilty of conspiracy with the buyers to operate illicit stills, even if the sales furthered the object of the conspiracy to which the buyers were parties.

The indictment in the case at bar charges the defendants with conspiring "to defraud the United States by evading and defeating, and attempting to evade and defeat, the payment of Internal Revenue taxes duly imposed by law on distilled spirits" (R. 4-5). A sale with knowledge that the buyer intends to use the material for illegal manufacture is, under the case cited, not the equivalent of knowledge that the buyers are parties to a conspiracy to evade the payment of taxes on distilled spirits.

The holding sought to be reviewed completely fails to give effect to the controlling decision of this Court, although it was called to the attention of the Circuit Court of Appeals.

2. The holding that the Government properly introduced evidence (other than certified proof of conviction) that petitioner was guilty of an unrelated felony, for the purpose of collateral impeachment, was contrary to established federal law.

When petitioner applied to the Circuit Court of Appeals to be admitted to bail prior to the argument of the appeal to that Court, Presiding Judge Learned Hand pronounced the ruling challenged to be "clear error." Indeed, in the opinion ultimately rendered herein, Clark, Circ. J., wrote for the Court:

> "It is settled beyond question that extrinsic evidence to prove the commission of another crime is inadmissible, and that the cross examiner is bound by the witness' denial except where there is a conviction of record. *Rau* v. *United States,* 2 Cir., 260 F. 131; *People* v. *DeGarmo,* 179 N. Y. 130, 71 N. E. 736; 3 Wigmore on Evidence, 3d Ed. 1940, Secs. 987, 980."

However, the Court proceeded to distinguish this case on the grounds that petitioner had opened the door and that the Government had a right to explain papers that it had itself placed in evidence. Also, the Court, while conceding

that the imputed offense was a felony (citing *People* v. *Hines,* 284 N. Y. 93), declared that the crime was "at most but a step beyond what appellant himself advanced; for playing the numbers itself appears to be a crime—a misdemeanor."

It is submitted that these attempted distinctions find no warrant in authority or principle. The ruling was clearly contrary not only to the cases cited but to a long line of others, including *Coulston* v. *United States* (C. C. A. 10) 51 F. 178; *United States* v. *Sager* (C. C. A. 2) 49 F. 2d 725; *Beyer* v. *United States* (C. C. A. 3) 282 F. 225; *Terry* v. *United States* (C. C. A. 9) 7 F. 2d 28; *Fabacher* v. *United States* (C. C. A. 5) 20 F. 2d 736; and *Niederluecke* v. *United States* (C. C. A. 8) 21 F. 2d 511.

3. The Trial Court improperly proceeded in the presence of the jury to punish a Government witness for contempt for refusal to testify, and to permit the jury to draw an inference unfavorable to petitioner from the attendant circumstances.

It has been noted that the great weight of authority condemns the procedure of adjudging a witness in contempt—or taking other punitive action with regard to a recalcitrant witness—in the presence of the jury. *McNutt* v. *United States* (C. C. A. 8) 267 F. 670; *Rutherford* v. *United States* (C. C. A. 2) 258 F. 855; *Lile* v. *State* (Ark.) 54 S. W. 2d 293; *State* v. *Smith,* 179 La. 294, 154 So. 2; *Pinn* v. *Commonwealth* (Va.) 186 S. E. 169; *Benton* v. *State* (Ga. App.) 199 S. E. 561; *People* v. *Van Arsdale,* 242 App. Div. 545, 266 N. Y. S. 502. It does not appear that the Supreme Court of the United States has specifically passed upon the point, and a review would appear desirable. The Circuit Court of Appeals herein briefly discussed the point but dismissed any possibility of prejudice "because there were sixteen defendants and no light was thrown on whom the witness was to testify against or what he would say." If

this distinction were sound, it would be permissible for the prosecution in any multiple-defendant case (and many important indictments answer this description) to ride roughshod over all legal safeguards and then plead as justification that the number of the defendants precluded any individual from claiming to have been prejudiced.

4. The reception in evidence of telephone company toll slips and the prepared chart summarizing the calls made to and from public telephones located in petitioner's two restaurants tended to suggest his complicity in the conspiracy and was prejudicial error.

Since the record showed calls to the homes of various other defendants, the obvious inference the prosecution sought to have the jury draw from this evidence is that petitioner was in regular telephonic communication with the alleged co-conspirators, many of whom he did not even know (R. 369). The reception of such testimony had the effect of saddling petitioner with the responsibility for all calls made through these public telephones—which were accessible to all patrons of the restaurants and, indeed, to any individuals who desired to use them—and particularly for such telephone conversations as may have taken place between various of the conspirators, although petitioner may have had no dealings with them whatsoever. Proof of this nature does not rise to the level of being even circumstantial and is altogether speculative and conjectural. Under the principles laid down in such authorities as *Robilio* v. *United States* (C. C. A. 6) 291 F. 975, *United States* v. *Frankel* (C. C. A. 2) 65 F. 2d 285, *Rowan* v. *State* (Md.) 3 Atl. 2d 753, and *People* v. *Rubin*, 286 N. Y. 56 (unofficial advance sheets of August 19th, 1941), it appears plainly inadmissible.

5. Prejudicial declarations of alleged co-conspirators made after the termination of a conspiracy are inadmissible.

That this is the law is undisputed. *Seeman* v. *United States* (C. C. A. 5) 90 F. 2d 88; *United States* v. *Lonardo* (C. C. A. 2) 67 F. 2d 883; *Oras* v. *United States* (C. C. A. 9) 67 F. 2d 463. Herein the Circuit Court of Appeals sought to justify the inapplicability of the rule by saying, "The very evidence he sought to exclude, if believed, showed that he still remained in the conspiracy." If other evidence shows the conspiracy to have ended, the contents of the questionable declaration may not logically be invoked simultaneously to show the reverse and to justify the reception in evidence.

6. Reasonable doubt may not be explained to a jury by inconsequential illustrations drawn from everyday affairs.

This Court has approved the instruction that the jury must be convinced to that degree of certainty upon which one acts in the weighty and important matters of life. *Hopt* v. *Utah,* 120 U. S. 430. But, in the language of Wilbur, Circ. J., in *Paddock* v. *United States* (C. C. A. 9) 79 F. 2d 872, "No court, so far as our examination shows, has attempted to state to a jury just what matters are of sufficient importance to be used in comparison with the decision of guilt in a criminal case which deprives an individual of his life or liberty. * * * To tell the jury in effect that reasonable doubt has no more significance in deciding a criminal case than the doubt by a juror as to whether the price offered to him for a piece of property is as much as he can expect to get for it, is in our mind to entirely eliminate the doctrine of reasonable doubt from the consideration of the jury."

In the present case the Circuit Court of Appeals characterized the trial Court's language as comprising "homely examples," and was constrained to admit, "Doubtless a

judge is better advised not to use trivial examples in such a serious context." The illustration relating to buying goods against a possible price increase was termed "most doubtful," "an ill-chosen illustration" and a "somewhat cloudy allusion." Notwithstanding, the context of the charge was deemed sufficient to eradicate any likelihood of prejudice. No useful purpose can be served at this point by an extended analysis of the charge (R. 475-504), but it may confidently be asserted that nothing stated by the trial Court materially qualified or detracted from the vice of the language criticized. Coming as it did in response to a specific inquiry by the jury near the very end of its deliberations and less than twenty minutes prior to the verdict, it may not be lightly dismissed as inconsequential.

Thus the Circuit Court of Appeals for the Second Circuit adopts a rule squarely at variance with that announced by the Ninth Circuit. An explanation of reasonable doubt is an element that enters into every criminal trial, and the law on the subject should be authoritatively determined.

7. The holding that the jury be required to continue its deliberations indefinitely after it had announced its inability to agree was improper.

Where a jury has determined the cause as to fifteen of sixteen defendants and reports in writing that it is split on the remaining defendant "after long and careful discussion," any attempt on the part of the trial Court to coerce a verdict should not be sanctioned. The jury had acted with care and discrimination in differentiating between those who were guilty and those who were innocent. It had returned repeatedly for new instructions and for reading of divers portions of the testimony. Particularly noteworthy is the request for a second explanation of reasonable doubt and the weight to be accorded to circumstantial evidence. Everything about the deliberations is indicative of the continued existence of a reasonable doubt, which ultimately yielded before the pressure applied by the trial Court. *Wissel* v. *United States* (C. C. A. 2) 22 F. 2d 468.

8. The cumulative effect of all of the foregoing errors and rulings was such as to deprive petitioner of a fair trial.

We feel that the errors argued above are important ones. They have sufficed in other cases to constitute grounds for reversal. Their substantial character would entitle them to favorable action in any case. Any one of them is, as matter of law, adequate ground for invalidating a judgment of conviction. When, as here, the evidence against petitioner is so slight and inconclusive, and where a jury has such patent difficulty in reaching a verdict, any one of the errors complained of may conceivably have become the decisive factor. As in *Parlton* v. *United States* (Ct. of Ap. D. C.) 75 F. 2d 772, "In this condition of the proof some inconsequential detail, unimportant in itself, might very well turn the scales. It was, therefore, the duty of the trial judge to be watchful to see that no extraneous or improper evidence got before the jury lest it might influence their minds and prejudice the legal rights of the accused, and as there was a failure in this regard, we are obliged to declare it error." Certainly, when all of the errors adduced are found in one case, their cumulative effect to entitle petitioner to a reversal must be virtually beyond the need for argument.

CONCLUSION

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	10
Conclusion	21

CITATIONS

Cases:

Allen v. *United States*, 164 U. S. 492	20
Beavers v. *United States*, 3 F. (2d) 860	14
Blakeslee v. *United States*, 32 F. (2d) 15	16
Boehm v. *United States*, 123 F. (2d) 791, certiorari denied, February 2, 1942, No. 810, October Term, 1941	20
Brink v. *United States*, 60 F. (2d) 231, certiorari denied, 287 U. S. 667	16
Devoe v. *United States*, 103 F. (2d) 584, certiorari denied, 308 U. S. 571	13
DiCarlo v. *United States*, 6 F. (2d) 364, certiorari denied, 268 U. S. 706	14
DeWitt v. *United States*, 291 Fed. 995, certiorari denied, 263 U. S. 714	16
Dolff v. *United States*, 61 F. (2d) 881, certiorari denied, 289 U. S. 763	16
Dysart v. *United States*, 270 Fed. 77, certiorari denied, 256 U. S. 694	13
Hewitt v. *United States*, 110 F. (2d) 1, certiorari denied, 310 U. S. 641	19
McNutt v. *United States*, 267 Fed. 670	14
Moore v. *United States*, 150 U. S. 57	13
People v. *Crawford*, 25 N. Y. S. (2d) 259	14
Reynolds v. *United States*, 48 F. (2d) 762	14
Rutherford v. *United States*, 258 Fed. 855	14
Suhay v. *United States*, 95 F. (2d) 890, certiorari denied, 304 U. S. 580	13
United States v. *Allis*, 73 Fed. 165, affirmed, 155 U. S. 117	20, 21
United States v. *Commerford*, 64 F. (2d) 28, certiorari denied, 289 U. S. 759	20
United States v. *Falcone*, 311 U. S. 205	11, 12

444298—42——1

Cases—Continued.	Page
United States v. *Gallo*, 123 F. (2d) 229	4
United States v. *Manton*, 107 F. (2d) 834, certiorari denied, 309 U. S. 664	19
United States v. *Radov*, 44 F. (2d) 155	16
United States v. *Rosso*, 58 F. (2d) 197	20
United States v. *Woods*, 66 F. (2d) 262	17
Valli v. *United States*, 94 F. (2d) 687	16
Wood v. *United States*, 84 F. (2d) 749, certiorari denied, 299 U. S. 589	16
Statutes:	
Criminal Code, sec. 37, 18 U. S. C. 88	3
New York Penal Law, sec. 974, Consol. Laws, c. 40	14
Miscellaneous:	
1 Wigmore, *Evidence* (3d ed., 1940), secs. 215, 216	13

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 849

JACOB NOVICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 543–547) is reported at 124 F. (2d) 107.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 17, 1941 (R. 547–548). The petition for a writ of certiorari was filed January 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there is sufficient evidence to support the jury's finding that petitioner was a party to the conspiracy charged in the indictment.

2. Whether, after petitioner had stated on direct examination that he "played numbers" and consented on cross-examination to the introduction of "numbers" sheets found on his person at the time he was arrested, the Government was entitled to show in rebuttal that the sheets indicated that petitioner was a "numbers" banker rather than a player.

3. Whether it was error for the trial court to commit for contempt, in the presence of the jury, a witness who had been called by the Government but refused to take the oath and testify.

4. Whether toll slips and a chart showing telephone calls between petitioner's restaurants and telephones registered in the names of other defendants were properly admitted in evidence.

5. Whether the evidence showed that the conspiracy terminated with the seizure of one of the stills involved on December 22, 1939, and thus rendered inadmissible declarations made by a co-conspirator after the seizure.

6. Whether the trial judge properly instructed the jury on the subject of reasonable doubt.

7. Whether the trial judge, in the exercise of his discretion, properly directed the jury to deliberate further after they had reported a disagreement as to petitioner.

STATUTE INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner and seventy-one others were charged in a one count indictment returned in the Southern District of New York on October 2, 1940, with conspiracy to defraud the United States of taxes on distilled spirits (R. 2–22). Twelve of the defendants, including petitioner, were convicted after trial (R. 44, 509–510) and four were acquitted (R. 44).[1] Petitioner was sentenced to twenty months imprisonment and to pay a fine of $5,000 (R. 60, 511). On appeal his conviction was

[1] Thirty-nine of the defendants pleaded guilty before trial (R. 26, 27, 29, 30, 31, 32, 33, 35, 36, 40, 41, 42) and seven changed their pleas and pleaded guilty at the trial (R. 42). Trial was severed as to seven others (R. 42, 43), the indictment was dismissed as to one (R. 43), and there was a directed verdict of acquittal as to another (R. 43). The record does not show the disposition as to the remaining defendant.

affirmed by the Circuit Court of Appeals (R. 547–548).[2]

The conspiracy centered around the operation of five stills, four of which, located in Yonkers, Bronx, and White Plains, New York, were seized by the Government (R. 63–65). The evidence in respect of petitioner's participation in the conspiracy may be summarized as follows:

Petitioner owned and operated two restaurants in Yonkers, the Kennedy House and the Prospect Bar and Grill (R. 120–121, 315, 363–364). Defendant Frank Galdo, who pleaded guilty (R. 41), operated a garage two blocks from the Prospect Bar and Grill (R. 413). In April 1939 petitioner told Galdo that he had a prospective tenant who wished to rent the basement of Galdo's garage to store sugar (R. 70–71). The next day petitioner returned with defendant Gallo and introduced the latter to Galdo as the tenant (R. 71–72, 77, 78). The southwest portion of the basement, which was farthest from the street, was selected for storage space, a $50 monthly rental was agreed upon, and petitioner gave Galdo $50 for the first month's rent (R. 72–74). Galdo was instructed to remove the cars from and lock the section where the sugar was to be stored (R. 75). A day or two later defendant Gallignano, who also pleaded guilty (R. 42), drove a truck containing copper coils and a

[2] Another defendant, Gallo, appealed separately and his conviction was also affirmed. *United States* v. *Gallo*, 123 F. (2d) 229 (C. C. A. 2).

copper column into the space which had been rented and left it there (R. 76–77, 79). At about the same time petitioner told Galdo that some sugar was coming in (R. 79–80) and immediately thereafter a truck of the Prospect Supply Company, a convicted defendant (R. 44), unloaded ten tons of sugar in the basement of the garage (R. 80–81). Gallignano returned later and removed a portion of the sugar and the copper column and coils (R. 81).

At this time a still was set up on property owned by one Kessman in Yonkers (R. 64).[3] During May and June 1939, while this still was in operation (R. 64), large quantities of sugar were regularly delivered to Galdo's garage by the Prospect Supply Company and were in turn hauled away by Gallignano and other defendants. The latter also brought in five-gallon cans of alcohol and these were stored in the garage. (R. 81–82, 85–86, 88–94, 96–101.)

During this same period petitioner arranged to buy fuel oil from Galdo at a price in excess of the market price (R. 82, 84, 94). The oil was hauled from Galdo's garage by Gallignano (R. 83).[4]

Galdo did not receive payment for the oil or any further payment of rent and early in June

[3] Petitioner admitted on cross-examination that he had known Kessman for twenty years and that he knew a still was operated on Kessman's property in the summer of 1939 (R. 394–395).

[4] The stills involved were operated with fuel oil (R. 65).

1939 he asked petitioner for $140 due him. Petitioner told him to see "the boys," meaning the Milo brothers.[5] Galdo accordingly talked to the Milos in the basement of the garage and it was arranged that he should be paid in alcohol at the rate of $10 per five-gallon can. (R. 94–96, 106–109.) Galdo later told petitioner that he was receiving alcohol in payment and petitioner replied that "if it was all right with them it was all right with him" (R. 107). Later in June, when Galdo asked petitioner for additional money due him, petitioner again referred him to the Milos, and he again received payment in alcohol (R. 109–110).

During June 1939 large quantities of sugar were also delivered by the Prospect Supply Company to a vacant garage in Yonkers (R. 65, 102–105).[6] Petitioner had made the arrangements to rent this garage from defendant Anthony Sylvestri,[7] the head of a contracting company, for $50 a month (R. 314–316). No money was paid to Sylvestri at the time and three or four weeks later he went

---

[5] Defendants Thomas and Louis Milo pleaded guilty during the trial (R. 42). They were patrons of petitioner's restaurants and petitioner had been well acquainted with Thomas Milo and had had numerous business and personal transactions with him over a period of many years (R. 367–368, 378–380, 405–407).

[6] The deliveries of sugar to this garage and Galdo's were under invoices made out to fictitious consignees for such items as tuna fish, walnuts, etc. (R. 66).

[7] Sylvestri pleaded guilty the day before the trial began (R. 41).

to the Kennedy House to collect from petitioner. Petitioner told Sylvestri that he had rented the garage for Thomas Milo, but said he would get in touch with Milo and obtain the money for Sylvestri. Petitioner also stated that Milo had used the garage for only three weeks for storing sugar and had then moved out; Milo, he said, had been running a still, but because "things were getting hot * * * they had to shut it down." (R. 316–317.)

In the latter part of June 1939 Galdo assisted some of the other defendants in dismantling and removing the still from the Kessman property (R. 110–118) and for this work he received $50 from petitioner (R. 122–123).[8]

In October 1939 petitioner told Galdo that "the same boys" wanted to move back into his garage (R. 125–126). Galdo demurred because he was afraid of "trouble," but upon petitioner's insistence he agreed to allow "them" to bring in "one load" (R. 126). Immediately thereafter a Prospect Supply Company truck delivered about ten tons of sugar at the garage (R. 127). A few days later, again at petitioner's request, Galdo received two more loads from the Prospect Supply Company. Petitioner and Louis Milo were present when one of these was delivered. (R. 130–132.) Gallignano, assisted by other defendants, again

[8] It appears that the defendants suspended operations for the summer because the still gave off a telltale odor and Kessman complained about it (R. 119).

hauled the sugar from the garage (R. 127–129, 132–133). Gallignano also purchased a quantity of fuel oil from Galdo (R. 129). On one of his calls at the garage Gallignano told Galdo that "they" were operating a still in the Bronx (R. 128, 129).

On one occasion in November 1939 Gallignano took Galdo's oil truck without the latter's consent and when he returned he explained that he had taken the truck to get some oil for the still (R. 134–135). Galdo then sold his truck because he wanted "to get out of this mess" (R. 135). A short time later petitioner told Galdo that he "should have given the fellows a little notice" before selling the truck; that some mash had been spoiled because they could not get oil to the still (R. 135–136).

On November 8, 1939, petitioner negotiated with the wholesale grocery firm of Shannon & Engle to purchase fifteen tons of sugar, the firm's entire current stock (R. 195–197, 203). On November 8 and 10 a truck driver, who introduced himself as "the fellow that Jake sent" (R. 197), hauled the sugar away, paying for it in cash (R. 198–203).

On November 15, 1939, the police seized a still in the Bronx and arrested defendants Petrosino and Lepore (R. 64).[9]

[9] Trial was severed as to Petrosino (R. 42) and Lepore was acquitted (R. 44, 498).

In the early part of November 1939, Sylvestri met Thomas Milo at petitioner's Prospect Bar and Grill and agreed to permit the erection of a still at 1 Lawton Street, Yonkers (R. 319–321), the office and main plant of Sylvestri's contracting firm (R. 314, 316). While they were discussing the matter, petitioner joined them and Milo told him that Sylvestri had consented to the erection of the still. Petitioner said, "That is all right." (R. 320–321.) During this same conversation, while petitioner was present, Milo told Sylvestri that if the still operated long enough Sylvestri would realize sufficient profit to discharge a $17,000 indebtedness (R. 321–322). In the latter part of November Sylvestri again met Milo and petitioner at petitioner's Kennedy House (R. 322). Milo told them that a lease would be drawn to cover the Sylvestri premises, that he would procure the necessary equipment for the still (R. 322–325), and that he wanted petitioner to "take care of the sugar end" (R. 325). Milo said that it would be necessary to have from 200 to 300 bags (ten to fifteen tons) of sugar a day. Petitioner replied, "I will see what I can do for you. I have two or three places I think that I can get sugar for you." (R. 325.)[10] At another meeting a few days later at the Prospect Bar and Grill Milo told petitioner, "I want you to get us a little protection for the place," to which petitioner re-

[10] Petitioner returned to Shannon & Engle in November to buy more sugar, but they refused to sell to him (R. 204).

plied, "I will see what I can do about giving us protection" (R. 327–328).

In November and December 1939 the Prospect Supply Company again made deliveries of large quantities of sugar to Galdo's garage and to another "drop" in Yonkers (R. 65). On December 22 a 3,000-gallon still was seized at Sylvestri's plant (R. 64, 328–329). That evening Sylvestri met Milo and asked him why the protection had been ineffectual. Milo said that petitioner had told him that afternoon "that something must have went wrong with the wires" (R. 329–330, have went wrong with the wires." (R. 329–330, 331.)

The last of the stills involved in the case was seized in April 1940 (R. 64). In the summer of that year, while the Government was investigating the operations of the conspirators (see R. 244–245, 247–248), petitioner told defendant Bernhardt,[11] a storekeeper and bootlegger (R. 234–235), that he had purchased sugar from the Prospect Supply Company (R. 279–280) and that the company was standing up well under the investigation and would not identify anyone (R. 247–248). Petitioner warned Bernhardt "not to identify anybody" (R. 248).

ARGUMENT

1. Petitioner says that he merely assisted others in obtaining sugar which was used in the manu-

[11] Bernhardt pleaded guilty before trial (R. 31).

facture of illicit alcohol, and asserts, somewhat inferentially, that there was no proof that he had knowledge of the conspiracy and that, therefore, under *United States* v. *Falcone,* 311 U. S. 205, he cannot be adjudged guilty as a conspirator (Pet. 3, 12–13). This contention is apparently advanced for the first time in the petition;[12] it is, in any event, wholly without merit.

Petitioner's relation with the other conspirators was not simply that of an innocent procurer of sugar. On the contrary, the evidence summarized in the Statement (*supra,* pp. 4–10) shows that he played an integral part in the perpetration of the entire scheme, occupying a key position as negotiator, not only with regard to sugar, but in other transactions as well. He arranged purchases of fuel oil, secured the premises used as "drops" for sugar, and paid the rent for one of these on at least one occasion. He participated in the negotiations preceding the establishment of the still at Sylvestri's plant, agreed to take care of the "sugar end," and undertook to obtain "protection" for the illicit enterprise. On one occasion he paid a coconspirator for dismantling and removing one of the stills. After the last of the stills had been seized and while the Government was conducting its investigation, petitioner warned one of the members of the illegal syndicate

[12] The *Falcone* case, which reached this Court from the court below, was not mentioned in its opinion in the instant case (see R. 544).

not to reveal information to the investigators. Throughout all these transactions petitioner displayed an intimate knowledge of the syndicate's plans and operations. Upon these facts it is manifest that the *Falcone* decision has no application and that the court below was correct in holding that the evidence "warranted submission of the case to the jury" (R. 544).

2. On direct examination, in explaining his relationship with defendant Thomas Milo, who, he said, was a "commission bettor," petitioner admitted that he played "numbers" (R. 367). On cross-examination, while he was being questioned about certain papers found in his possession when he was arrested, his counsel interrupted to suggest that he had no objection to the introduction in evidence of all such papers (R. 432). Among these papers were several sheets and slips which were subsequently admitted without objection as Exhibit 174 (R. 440–441, 517). Petitioner admitted that these latter papers referred to "numbers" play, but asserted that they showed bets made by him and not bets which he had taken (R. 440–441). In rebuttal the Government introduced testimony of a city detective, who was qualified as an expert on "numbers," that the papers indicated that the person who had them in his possession was a "number banker" (R. 459–460).

Petitioner argues (Pet. 3–4, 13–14) that the detective's testimony indicated that he was guilty of an unrelated felony and thus had the effect of

impeaching him on a collateral issue. This contention is untenable. As the court below pointed out (R. 545), the matter was opened by petitioner's testimony on direct examination. The detective's testimony was designed to show that petitioner's relationship with another defendant was of a different nature than petitioner asserted it to be and was therefore proper rebuttal. It was, moreover, admissible to explain the ambiguous figures appearing on the papers contained in Exhibit 174, which had been admitted with the consent of petitioner's counsel. Since the testimony was proper rebuttal, the fact that it might have incidentally implied the commission of an illegal act did not render it inadmissible. *Moore* v. *United States,* 150 U. S. 57, 61; *Devoe* v. *United States,* 103 F. (2d) 584, 588 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States,* 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Dysart* v. *United States,* 270 Fed. 77, 79–80 (C. C. A. 5), certiorari denied, 256 U. S. 694; 1 Wigmore, *Evidence* (3d ed., 1940), secs. 215, 216.[13]

Furthermore, the fact that numbers banking is a crime under New York law was not mentioned while the detective was being interrogated by the

[13] The cases cited by petitioner (Pet. 14) are inapposite. They involved situations where truly collateral matters were raised for the first time on cross-examination of a defendant and were pursued by the prosecution in rebuttal, and illustrate the rule stated by the court below (R. 545) and quoted in petitioner's brief (p. 13).

Government, and no charge was requested on the matter (see R. 545–546). The testimony could have had but slight, if any, effect upon the jury. Indeed, it added little to what petitioner had voluntarily admitted on direct examination, for playing numbers is itself a crime in New York. New York Penal Law, Sec. 974, Consol. Laws, c. 40; *People* v. *Crawford,* 25 N. Y. S. (2d) 259.

3. During the trial the Government called one Louis Harrison as a witness and he refused to testify because he did not want to be a "stool pigeon" (R. 191). The court, after admonishing Harrison several times and warning him of the consequences, committed him for contempt (R. 191–192). Petitioner argues (Pet. 4, 14–15) that this action of the court in the presence of the jury constituted prejudicial error.

Petitioner cites no authorities involving contempts which sustain his contention, but relies by analogy upon cases concerning perjurious testimony (Pet. 14). Though it has been held that in some circumstances it may be prejudicial error for a court, in the presence of the jury, to direct that a witness be held for testifying falsely,[14] the *ratio decidendi* of those decisions has no applica-

[14] *McNutt* v. *United States*, 267 Fed. 670 (C. C. A. 8); *Rutherford* v. *United States*, 258 Fed. 855 (C. C. A. 2). Compare, however, *Reynolds* v. *United States*, 48 F. (2d) 762, 763 (C. C. A. 10); *DiCarlo* v. *United States*, 6 F. (2d) 364, 367 (C. C. A. 2), certiorari denied, 268 U. S. 706; *Beavers* v. *United States*, 3 F. (2d) 860, 863 (C. C. A. 6).

tion here, for Harrison refused to testify at all. And, of course, a court has inherent power to summarily commit a contemnor for contumacious conduct in its presence.

Moreover, the trial court, at the request of petitioner's counsel, specifically instructed the jury that they should give no heed to the incident so far as the defendants were concerned, because the witness "said nothing against them" (R. 192–193). In the circumstances, it can scarcely be contended that the jury could have drawn any unfavorable inference against petitioner because of the incident, particularly since he was but one of sixteen defendants on trial.

4. Petitioner assails the reception in evidence of telephone company toll slips and a chart prepared by the Government showing that calls were made from petitioner's restaurants to telephones registered in the names of other defendants and from those telephones to the restaurants. He argues that this evidence in no way proved that the calls were made by or to him because the telephones in his restaurants were public pay stations. (Pet. 4–5, 15.) This contention must fall in view of the evidence that petitioner was closely associated with the other defendants and that the restaurants were meeting places of the conspirators, including petitioner. The jury was entitled to infer from this evidence that the calls in question were made by or to petitioner.

444298—42——2

The same objection as petitioner makes here was rejected in a similar factual situation in *DeWitt* v. *United States*, 291 Fed. 995, 1002 (C. C. A. 6), certiorari denied, 263 U. S. 714. The court there held, as did the court below (R. 547), that evidence of telephone calls of this character is admissible as showing the mode of communication between conspirators and the fact that they were in frequent communication with each other.[15]

5. A still was seized at Sylvestri's plant on December 22, 1939 (R. 64). Sylvestri testified that on the night of the twenty-second, after the seizure, Thomas Milo told him that he had seen petitioner that afternoon and that petitioner had said that "something went wrong" (R. 329–330, 331; see p. 10, *supra*). Petitioner apparently contends that the seizure of this still terminated the conspiracy and that for this reason Sylvestri's testimony as to Milo's statement to him was inadmissible (Pet. 5, 16).

The evidence showed, however, that the last of the stills involved in the conspiracy was seized on April 3, 1940 (R. 64). And petitioner stipulated for the purposes of the bill of exceptions

[15] See also *Valli* v. *United States*, 94 F. (2d) 687, 693 (C. C. A. 1); *Wood* v. *United States*, 84 F. (2d) 749, 751 (C. C. A. 5), certiorari denied, 299 U. S. 589; *Dolff* v. *United States*, 61 F. (2d) 881, 885 (C. C. A. 7), certiorari denied, 289 U. S. 763; *Brink* v. *United States*, 60 F. (2d) 231, 234 (C. C. A. 6), certiorari denied, 287 U. S. 667; *United States* v. *Rador*, 44 F. (2d) 155, 157 (C. C. A. 3); *Blakeslee* v. *United States*, 32 F. (2d) 15, 18 (C. C. A. 1).

that "The testimony indicated that the operation of these stills and the subsequent sale and resale of the alcohol to the eventual consumers was all done and performed in the execution of a single conspiracy" (R. 64–65).

Furthermore, the indictment charged that as a part of the conspiracy the defendants concealed their transactions to prevent the disclosure of the existence of the conspiracy (R. 14). It was proved that in the spring of 1940 petitioner warned defendant Bernhardt that if he identified anyone in connection with the case he would be "cut up into ribbons" (R. 256–257; see also R. 248). It is apparent, too, that at this time petitioner was working in conjunction with the defendant Samuel Feldman, of the Prospect Supply Company, to conceal the deliveries of sugar to the various "drops" (R. 244–251).

Consequently, the remarks of Milo to Sylvestri on the evening of December 22, 1939, were admissible as statements of a co-conspirator regarding the conspiracy during its course. *United States* v. *Woods,* 66 F. (2d) 262, 265 (C. C. A. 2).

Finally, as the Circuit Court of Appeals pointed out (R. 547), the very evidence which petitioner sought to exclude showed that he was still identified with the conspiracy.[16]

6. Petitioner complains (Pet. 6, 16–17) of the examples which the trial judge used in explaining

[16] Milo's statement to Sylvestri concerned the "protection" which petitioner had promised for the still (see pp. 9–10, *supra*).

to the jury what constitutes reasonable doubt. These examples, quoted in petitioner's brief (p. 6), were given when the jury returned after some deliberation of petitioner's case and requested the judge to "explain again what constitutes reasonable doubt" (R. 506–507). A reading of the full context shows, however, that the judge's exposition of this concept was correct (R. 480–482, 487, 506–509). He explicitly instructed the jury, both in the main and in the supplemental charge, that if they did not "have a moral certainty of the defendant's guilt," he could not be found guilty (R. 481, 506). As the court below said (R. 546), the illustrations, though perhaps inappropriate, were used to impress upon the jury the kind of strong conviction they must have before they could find against the accused. Viewed in their context it cannot be said that these examples misled the jury.

The fairness of the main charge, which included one of the examples given in the supplemental charge (R. 481–482), was in effect conceded by petitioner's counsel when he failed to object (see R. 489). He requested one amplification and one modification, neither of which related to reasonable doubt, and these were granted (R. 489–490, 493–494). Nor did he object when the supplemental charge was given (see R. 509). The alleged error, therefore, may not be raised on appeal since it was not called to the attention of the trial court when a timely correction could have

been made. *United States* v. *Manton,* 107 F. (2d) 834, 847 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Hewitt* v. *United States,* 110 F. (2d) 1, 9 (C. C. A. 8), certiorari denied, 310 U. S. 641.

7. The jury retired at 2:00 p. m. on May 26, 1941 (R. 44, 495), and about four hours later returned verdicts as to fourteen of the defendants (R. 496–498). A half hour later a verdict was returned as to another (R. 502, 503). It was then 7:00 p. m. and the jury went out for dinner, after which they continued their deliberations. At 9:15 p. m. the jury reported a disagreement as to petitioner. (R. 504.) The trial judge said he felt constrained to ask the jury to consider the case further. He pointed out that the trial was long and costly both to the Government and petitioner. He said that disagreements accomplish nothing because "it has all got to be done over again." He stated that while justice both to the Government and petitioner required that they endeavor to reach a verdict one way or the other, none of the jurors should "abdicate his judgment to anyone else." (R. 504.)

After the jury had retired for further deliberation the court instructed the clerk that if they had not agreed upon a verdict by 11:00 p. m. he should take them to a hotel for the night (R. 505). The jury not having reached a verdict, court adjourned at 11 o'clock until 10:30 a. m. the following day and the jury was taken to a hotel (R. 505). At 2:35 p. m. the next day, after having returned

once to hear certain testimony read (R. 505–506) and again for a re-explanation of what constitutes reasonable doubt (R. 506–509; see pp. 17–19, *supra*), the jury returned its verdict of guilty (R. 509–510).

Petitioner argues (Pet. 7, 17) that the court should have discharged the jury when they reported a disagreement. This, however, was within the discretion of the court. In view of the number of defendants involved, the length of the trial, the volume of evidence presented, and the order in which the verdicts were returned, it seems clear that the jury had not devoted an inordinate amount of time to consideration of petitioner's case alone at the time they reported a disagreement. There was, therefore, no abuse of discretion in sending the jury back for further deliberation. *United States* v. *Rosso,* 58 F. (2d) 197, 201 (C. C. A. 2). Nor, in the light of the court's admonition that none of the jurors should forsake his own conscientious convictions, was there any impropriety, as petitioner contends, in the court's remarks concerning the desirability of reaching a verdict. Indeed, it was the duty of the court to so instruct the jury. *Allen* v. *United States,* 164 U. S. 492, 501–502; *Boehm* v. *United States,* 123 F. (2d) 791, 812 (C. C. A. 8), certiorari denied, February 2, 1942, No. 810, October Term, 1941; *United States* v. *Commerford,* 64 F. (2d) 28, 31 (C. C. A. 2), certiorari denied, 289 U. S. 759; *United States*

v. *Rosso, supra; United States* v. *Allis,* 73 Fed. 165, 182 (C. C. E. D. Kan.), affirmed, 155 U. S. 117.

CONCLUSION

The case was correctly decided below, there is no real conflict of decisions, and no question of general importance is involved. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
KEITH BROWN,
W. MARVIN SMITH,
Attorneys.

FEBRUARY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

IN THE

Supreme Court of the United [illegible]

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF IN SUPPORT OF A[illegible] TION FOR REHEARING OF PETITION [illegible] WRIT OF CERTIORARI

JACOB W. FRIEDMAN
Attorney for Peti[illegible]

INDEX

	PAGE
Petition for Rehearing	1
Brief on Application for Rehearing	3

TABLE OF CASES CITED

Durland v. United States, 161 U. S. 306	3
Paddock v. United States (C. C. A. 9), 79 F. (2d) 872	6
United States v. Falcone, 311 U. S. 205	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jacob Novick, respectfully prays this Court to reconsider its determination made on March 2, 1942, which denied his petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of conviction of the crime of conspiracy to defraud the United States of taxes on distilled spirits.

The Court is referred to the original petition and brief filed herein in January, 1942, the contents whereof are reiterated and incorporated.

Petitioner, a restaurateur of reputable and law-abiding character, has been sentenced to a term of twenty months' imprisonment and a fine of $5,000 (R. 511). He was convicted under an indictment naming seventy-three defendants, sixteen of whom were tried simultaneously. Four

were acquitted. The case of this petitioner alone gave the utmost difficulty to the jury, which reported in writing seven hours after the submission of the cause (verdicts having already been rendered as to all the rest), "The jury is sorry to report that it is split on Jacob Novick after long and careful discussion" (R. 504). It was not until the afternoon of the following day, after several supplementary charges (R. 505-510), that the jury finally reported a verdict adverse to petitioner.

It is obvious that in such circumstances petitioner could receive exact justice only in a trial reasonably free from taint of error and by a scrupulous adherence to both procedural safeguards and substantive rules applicable to such a case. Petitioner has at all times insisted upon his innocence of the offense charged. His conviction herein is directly ascribable to the failure of the learned Trial Court to accord him a fair trial—not through any deliberate or advised desire to curtail his rights but by virtue of a series of important and prejudicial rulings.

The questions at issue involve important points of criminal law and procedure, all of them of a character frequently arising in federal courts. It is desirable that they be clarified by a plenary review, to the end that the law be settled or better understood, and, more specifically, that this petitioner should not be unjustly punished.

Your petitioner, therefore, respectfully submits that a rehearing should be granted herein and the determination of this Court denying the writ of certiorari set aside and a writ of certiorari to review the judgment of conviction granted.

March 17th, 1942.

Jacob W. Friedman,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON APPLICATION FOR REHEARING

The same order of discussion of points is preserved herein as in the original application.

I

The Government's assertion in its brief (p. 11) that petitioner's reliance upon *United States* v. *Falcone*, 311 U. S. 205, is "apparently advanced for the first time in the petition", is erroneous. The case was cited by the writer in the Circuit Court of Appeals as controlling the instant situation. If there be any doubt that the *Falcone* case governs this appeal, it is most desirable that the principles laid down therein be explained and their precise limits declared. In conjunction with the earlier holding in *Durland* v. *United States*, 161 U. S. 306, indicating that negligence or naïveté cannot be a substitute for criminal intent, it is submitted that petitioner's conviction should not be sustained as matter of law. In the Government's attempt to distinguish the instant case, it makes several misleading

references (p. 11) to the petitioner's handling certain payments for other defendants, notwithstanding the fact that these acts were merely innocent accommodations. The suggestion is even made that guilt can be inferred from his having paid another "for dismantling and removing one of the stills". Surely the eradication of an instrumentality of crime does not constitute evidence of guilt. Petitioner realizes that this is no occasion for extended scrutiny of the evidence; yet a thorough examination of the record will not disclose any appreciable evidence to differentiate the issue from that presented in the *Falcone* case, to the benefit of which holding petitioner is entitled.

II

Attempts in one form or another of the Government to show that a defendant has committed other and unrelated offenses have given rise to a host of decisions bearing upon the general rule and its limitations. Herein the prosecution was permitted to impeach petitioner on a collateral issue and to suggest thereby that he was guilty of an unrelated felony. The attempted justification of this gross invasion of his rights upon various obscure grounds falls utterly short of adducing any legal excuse. The last suggestion (brief, pp. 13-14), that petitioner admitted that he occasionally played policy (a misdemeanor) and that thus he could not be harmed by the intimation that he was a policy banker (a felony), is altogether novel. The frequency with which the question of proof of other crimes arises renders desirable an authoritative exposition of the doctrine in its incidence to this case.

III

The Government has cited no case, and petitioner is aware of none, wherein this Court has passed upon the propriety of a trial judge's holding a recalcitrant witness in contempt in the presence of a jury, to the detriment of a defendant's rights.

IV

Petitioner was undoubtedly prejudiced by the reception in evidence of telephone company toll slips and a prepared chart showing that calls were made from and to public telephones located in his restaurants (respectively to and from telephones listed in the names of co-defendants). The Government boldly asserts (p. 15), "The jury was entitled to infer from this evidence that the calls in question were made by or to petitioner." Petitioner does not believe that this Court has ever approved any such ruling, most assuredly with respect to *public* telephone instruments. If this be the type of evidence upon which prosecutors are now relying to obtain convictions, it is desirable that the correctness of so significant a ruling be authoritatively determined.

V

In contravention of established law, the Trial Court received against petitioner the alleged declarations of co-conspirators after the termination of the conspiracy. It is fallaciously argued that the very declarations by their contents demonstrate the continuation of the conspiracy, and the proffered evidence is thus lifted by its own bootstraps into a status of admissibility.

VI

The Circuit Court of Appeals admitted in its opinion that the charge was improper on the subject of reasonable doubt, characterizing the "homely examples" mentioned by the Trial Court in the supplementary instructions (the jury having specifically requested a redefinition of reasonable doubt) as "trivial examples", "most doubtful", "an ill-chosen illustration" and a "somewhat cloudy allusion". The Circuit Court of Appeals, however, relied on the main charge (given to the jury the day previously) as adequate to nullify any possible harmful effect arising from these

final words (which came twenty minutes before the verdict). Petitioner insists that any such instructions, whose effect is "to entirely eliminate the doctrine of reasonable doubt from the consideration of the jury"—in the language of *Paddock* v. *United States* (C. C. A. 9), 79 F. (2d) 872—must be deemed material.

VII

The jury herein was required to deliberate an inordinate length of time with respect to petitioner, the effect of which under the circumstances disclosed was to coerce or induce a verdict of guilt.

VIII

The cumulative effect of what has been discussed above, as well as in petitioner's original papers, was such as to deprive him of a fair trial. Errors which might be disregarded in a case where the proof of guilt was clear become especially important and prejudicial when, as herein, the jury had such difficulty in arriving at its verdict.

CONCLUSION

Petitioner respectfully urges this Court to rescind its determination made on March 2, 1942, denying his petition for a writ of certiorari and that it grant such writ to the United States Circuit Court of Appeals for the Second Circuit to review the conviction herein.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.